HU SEPANG

v.

INSPECTOR KEONG ON ENG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[CIVIL SUIT NO. P 1569 OF 1985]
18 SEPTEMBER 1990

POLICE: *Powers - Police officers - Breach - Civil liability - Powers and duties - Power and discretion - Where there is no civil or criminal remedy - Damages - Police Act 1967, ss. 3(3), 20(3).*

On 17 September 1985, the plaintiff P who was at the Malacca State Assembly Building was forcibly restrained by a stranger X when he entered the public gallery of the Assembly. P alleges that he was dragged, punched and pushed by X and 3 others in the presence of the 1st defendant, D1 who, despite repeated requests by P, failed to apprehend the assailants. P also alleged that the 2nd defendant, D2, who went to the scene refused to apprehend the assailants. As a result, P alleged that D1 and D2 had breached their statutory duty under Police Act 1967. The third defendant D3 was sued in its vicarious capacity as the employer of D1 and D2.

The defence submits that public policy requires that a police officer should not be liable merely for failure to act in a manner preferred by the individual.

The defendants applied O. 18 r. 19 of the Rules of the High Court 1980 to strike out P's action on the ground that P's writ and statement of claim had not revealed any cause of action; the defendants' application was dismissed by the Senior Assistant Registrar SAR, on 9 February 1990. This is an appeal against the decision of the SAR.

Held:

[1] Under s. 3(3) of the Act, a police officer has certain powers and certain specific duties as specified in s. 20(3) - failure on the part of a police officer to carry out his duties will subject him to disciplinary action; the Act is silent as regards to a police officer being subject to civil or criminal liability for his failure to carry out his duties.

[2] On the assumption that P could prove the allegations at trial, in relation to the question of damages:

(a) D1 and D2 should have heeded P's requests for assistance during his assault;

(b) even assuming that D1 and D2 were under the impression that the assault was a private matter they should at least intervene to maintain peace and order even if they were in doubt as to whether they had the right to apprehend the persons assaulting P;

(c) P was not dictating to D1 and D2 the manner in which they should exercise their discretion - all he was asking was that the police should perform their duties to stop the assault as P was being severely assaulted; this was a simple and reasonable request;

(d) how the police chose to act is a matter for them to decide but to refuse to act is a breach of their statutory duty.

[3] In addition P's allegations about the failure by D2 to apprehend P's assailants despite repeated requests amount to an allegation of negligence on the part of the defendants in the performance of their duties which they owed to P under the principle in *Donoghue v. Stevenson.*

[4] The omission of the word "negligence" would not have surprised the defendants, it is clear that P's pleading indicate that he is relying on the element of negligence despite the fact that the word was not used.

[SAR'S decision affirmed.]

Cases referred to:
Drummond-Jackson v. BMA [1970] 1 WLR 688
Schacht v. The Queen in Right of the Province of Ontario [1972] 30 DLR (3d) 641
Cutler v. Wandsworth Stadium Ltd. [1949] AC 398
Dorset Yacht Co. Ltd. v. Home Office [1970] 2 WLR 1140
Hill v. Chief Constable of West Yorkshire [1988] 2 All ER 238
R v. Metropolitan Police Constable Ex parte Blackburn [1968] 1 All ER 763
Donoghue v. Stevenson [1932] AC 562
Datton v. Bognor Regis Urban District Council [1972] 1 QB 373

Legislation referred to:
Police Act 1967, ss. 3(3), 20(3)
Rules of the High Court 1980, O. 18 r. 19

Other sources referred to:
Torts 14th Edn., para. 1581 by Clerk & Lindsell

For the plaintiff - C.G. Oh; M/s. Karpal Singh & Co.
For the defendants - Mohd. Yusoff, Senior Federal Counsel - Attorney-General's Chambers

JUDGMENT

Lim Beng Choon J:

This is an appeal against the decision of the Senior Assistant Registrar of this Court (SAR) given on 9 February 1990 dismissing the defendants' application made by way of summons-in-chambers pursuant to O. 18 r. 19 of the Rules of the High Court 1980 to strike out the writ action instituted by the plaintiff and to stay all proceedings in the action pending the disposal of defendants' application. It is important to note that although in their application to strike out the writ action the defendants had asserted therein that they would rely on all the four grounds specified in the said O. 18 r. 19(1) nevertheless in his submission at the hearing before the SAR on 18 October 1989, the Senior Federal Counsel representing the three defendants submitted that he would rely only on the ground that the writ and statement of claim of the plaintiff had not revealed any cause of action; hence the defendants had not filed any affidavit in support of their application as they were precluded from doing so under subrule (2) of O. 18 r. 19.

The law relating to the summary process of striking out an action on the ground that the statement of claim does not show a cause of action is succinctly stated by Lord Pearson in *Drummond-Jackson v. BMA* [1970] 1 WLR 688. I need to reproduce only the more pertinent passages of Lord Pearson's judgment at p. 695:

> Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim on disclosing no reasonable cause of action is a summary power which should be exercised **in plain and obvious cases**. (Emphasis supplied).

and at p. 696:

> In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the evident intention of the rule for several reasons. First, there is in para. (1)(a) of the rule the expression "reasonable cause of action," to which Lindley MR called attention in *Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd.* [1899] 1 QB 86, pp. 90-91. No exact paraphrase can be given, but I think "reasonable cause of action" means a cause of action with some chance of success, when (as required by para. (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In *Nagle v. Feilden* [1966] 2 QB 643 Danckwerts LJ said at p. 648:
>
> > The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the Court.
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> Salmon LJ said, at p. 651:
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> > It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.

On the authority of the above case it is clear that so long as the statement of claim or the particulars disclose **some** cause of action or raise some question fit to be decided by a Judge the mere fact that the case is weak and not likely to succeed is no ground for striking it out.

Let us therefore examine the relevant averments of the plaintiff in his statement of claim. Firstly in para. 4 thereof the plaintiff claimed that on 17 September 1985 he was at the Melaka State Assembly building at about 2.50 p.m. to witness the DAP Assemblyman for Durian Daun who was to move a motion to adjourn the House to discuss an urgent matter of public importance. Secondly in para. 5 thereof the plaintiff averred that when he entered the public gallery of the Assembly, he was forcibly restrained by a person unknown to him. He was dragged, punched and pushed out by the said person together with three other persons unknown to the plaintiff in the presence of the 1st defendant, Inspector Keong On Eng who despite repeated requests by the plaintiff, failed to apprehend the persons referred to hereinbefore. The plaintiff also said that the 2nd defendant, the Chief Police Officer, Melaka who went to the scene, likewise failed and/or refused to apprehend the plaintiff's assailants despite repeated requests made by the plaintiff. Thirdly in para. 6 thereof the plaintiff said that the 1st and 2nd defendants failed to carry out their duties as required of them pursuant to their oath of office. The two defendants failed and/or refused to render assistance to the plaintiff to which assistance the plaintiff was lawfully entitled and that the two defendants failed in their duty owed to the plaintiff in not apprehending the persons who assaulted him or to take immediate steps to ensure the plaintiff was not assaulted. The plaintiff thereafter lodged a report at the Balai Polis Melaka Tengah. Lastly in para. 8 thereof the plaintiff said that he had suffered humiliation, loss and damage. He therefore prayed for damages, costs and any further relief or other relief deemed fit and proper by the Court. The 3rd defendant was sued in its capacity as the employer of the two defendants and therefore vicariously liable for their failure to render assistance to the plaintiff or to prevent the plaintiff from being assaulted.

From the pleadings of the plaintiff there is no doubt that he firstly pegged his cause of action on breach of statutory duty on the part of the 1st and 2nd defendants. It has been said that to establish civil liability for a breach of statutory duty the plaintiff must show that:

(a) the injury he has suffered is within the ambit of the statute,

(b) the statutory duty imposes a liability to civil action,

(c) the statutory duty was not fulfilled, and

(d) the breach of duty has caused his injury.

- see *Clerk & Lindsell on Torts* 14th Edn., para. 1581. I should also bear in mind that a statute may impose a duty towards persons generally in which case no question can arise of whether the plaintiff is within the class protected. Furthermore it is also necessary to bear in mind that where a statute confers power coupled with a duty to exercise it, failure to do so is a breach of that duty for which a remedy will lie. An interesting case advocating this proposition is the case of *Schacht v. The Queen in Right of the Province of Ontario* [1972] 30 DLR (3d) 641 to which I shall revert to later in this judgment. On the other hand, where the loss is occasioned by failure to exercise a power coupled with a discretion there is no liability - see *Great Central Ry. v. Hewlett* [1916] 2 AC 511. But a plaintiff is still entitled to compensation if he can prove that there had been malicious refusal to exercise a discretionary statutory power - see *David v. Abdul Cader* [1963] 1 WLR 834. Finally I must remind myself that if a statute creates a duty but imposes no remedy civil or criminal for its breach, there is a presumption that a person who is injured thereby will have a right of action for otherwise "the statute would be but a pious aspiration" (per judgment of Lord Simonds in *Cutler v. Wandsworth Stadium Ltd.* [1949] AC 398 at 407).

It is quite clear that the statutory duty of which the plaintiff is complaining that the defendants had breached is encompassed in the Police Act 1967 (Act No. 41 of 1967). It is to be noted that the said Act confers powers to the police for the maintenance of law and order, the preservation of peace and security of the Federation, the prevention and detection of crime, the apprehension and prosecution of offenders and the collection of security intelligence (see s. 3 subsection (3) thereof). Coupled with these powers a police officer is required to perform certain specific duties. I need only mention the duties pertinent to this case and they can be found in subsection (3) of s. 20 of the said Act which reads:

> (3) Without prejudice to the generality of the foregoing provisions or the provisions of any other law, it shall be the duty of a police officer to carry out the purposes mentioned in subsection (3) of s. 3; and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including:
>
> (a) apprehending all persons whom he is by law authorised to apprehend;
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> (j) giving assistance in the protection of life and property;

It is also relevant to note that failure on the part of a police officer to carry out his duties will subject him to disciplinary action. The said Act is silent as regards to a police officer being subject to civil or criminal liability for his failure to carry out his duties.

Reverting to the averments of the plaintiff I must assume that he could prove the allegations made by him in his pleadings if the case goes on trial. The question then is whether on that assumption the defendants would be liable in damages - see *Dorset Yacht Co. Ltd. v. Home Office* [1970] 2 WLR 1140 at 1145. The averments of the plaintiff which are very relevant are that as he entered the public gallery of the Melaka State Assembly building at 2.50 p.m. on 17 September 1985 he was restrained by a person unknown to him who bodily and severely assaulted him in the presence of the 1st defendant. Despite his repeated requests for help the 1st defendant chose to do nothing. Later three more persons not known to the plaintiff joined in assaulting the plaintiff. Likewise when the 2nd defendant came to the scene he too

did nothing notwithstanding repeated requests for help by the plaintiff. In such a situation it is manifestly clear that the 1st if not the 2nd defendant should pay heed to the plaintiff's requests for assistance. Even assuming that the 1st and 2nd defendants were under the impression that the assault was a private matter they should at least intervene to maintain peace and order in the Melaka State Assembly building even if they were in doubt whether they had the right to apprehend the persons assaulting the plaintiff. The Senior Federal Counsel in his written submission asserted that no member of the public could dictate the manner in which the police went about the investigation and prosecution of a crime. To that I agree to a certain extent. But in the present case the plaintiff had been severely assaulted by the four persons in the presence of the 1st and 2nd defendants. The plaintiff was not asking the two defendants as to how they should exercise their discretion - all he was asking was that the police should perform their duties to stop the assault which to my mind is a simple and reasonable request bearing in mind the circumstances of the case. Let us take the matter further by using a hypothetical case. Suppose a house owner in a situation of emergency telephoned the police stating that he saw four persons trying to break into his house to commit what he suspected was robbery, could the police who received such a message chose to do nothing? The answer is a definite No. How the police choose to act is a matter for them to decide but to refuse to act is certainly a breach of their statutory duty. To lend support to my proposition I would like to cite firstly the case of *Schacht v. The Queen in the Right of Province of Ontario* (*supra*). In that case the police were under a statutory duty to maintain patrol along the highway and to warn motorists of hazards. They failed to warn the plaintiff of a hazard which had come to the knowledge of two policemen and they were held equally responsible to the plaintiff for damages he sustained.

Turning to the submission of the Senior Federal Counsel representing the defendants, the crux of his submission is that public policy requires that a police officer should not be liable merely for failure to act in a manner preferred by an individual. I agree with his proposition but in the present case the plaintiff was not and had never asked the police to act in a manner dictated by him - all he asked was to require the police to intervene in the assault and to maintain peace and order particularly in the august body of the Melaka Legislature Assembly. The learned Senior Federal Counsel relied on three authorities to support his contention. I need only to mention two of the authorities as the third authority has got nothing to do with the performance of police duties and which authority merely expounded general principles relating to breach of statutory duties which are clearly impossible to catalogue. The first case relied by the learned Senior Federal Counsel is *R v. Metropolitan Police Constable Ex Parte Blackburn* [1968] 1 All ER 763. To my mind that case is of no assistance to the defendants. In that case the appellant was challenging the directive of the Commissioner of Police directing the police not to take proceedings against gambling clubs for breach of gambling laws unless there were complaints of cheating or they had become haunts of criminals. The appellant in that case would possibly succeed in getting a *mandamus* to compel the Commission of Police to take proceedings against all gambling clubs for breaching the gambling law if not for the revocation of the directive. In the judgment of Lord Denning at p. 766 his Lordship made this instructive observation:

> If this argument were correct, it would mean that insofar as their most important function is concerned, the police are above the law and therefore immune from any control of the Court. I reject that argument. In my judgment the police owe the public a clear legal duty to enforce the law - a duty which I have no doubt they recognise and which generally they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the Court would not be powerless to intervene.

The next case relied by the learned Senior Federal Counsel is the case of *Hill v. Chief Constable of West Yorkshire* [1988] 2 All ER 238.

In that case the plaintiff was questioning the manner in which the police exercised their discretion in apprehending a certain suspect from committing murders and attacks on young female victims. In holding that the plaintiff had no cause of action the Court held that:

> In the absence of any special characteristic or ingredient over and above reasonable foreseeability of likely harm which would establish proximity of relationship between the victim of a crime and the police, the police did not owe a general duty of care to individual members of the public to identify and apprehend an unknown criminal, even though it was reasonably foreseeable that harm was likely to be caused to a member of the public if the criminal was not detected and apprehended. Furthermore, even if such a duty did exist public policy required that the police should not be liable in such circumstances. It followed that the chief constable could not be liable in damages for negligence because of failure of the police to detect S before he murdered the appellant's daughter. The appeal would therefore be dismissed. (see p. 238).

An important observation has been made by Lord Keith of Kinkel at p. 240 where he said:

> By common law police officers owe to the general public a duty to enforce the criminal law; see *R v. Metropolitan Police Comr, ex p. Blackburn* [1968] 1 All ER 763 [1968] 2 QB 118. That duty may be enforced by *mandamus*, at the instance of one having title to sue. But as that case shows, a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him to decide how available resources should be deployed, whether particular lines of inquiry should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision on such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may in a position to have recourse to judicial review.

Needless to say that the *Hill* case is clearly distinguishable for in that case the appellant was in fact trying to dictate the manner in which the police should carry out their duties.

Even if I am wrong in arriving at my conclusion as stated above I am satisfied that the second attack mounted by the plaintiff in his pleadings amounted to an allegation of negligence on the part of the defendants in the performance of their duties which they owed to the plaintiff under the principle as laid down in the leading case of *Donoghue v. Stevenson* [1932] AC 562. The averments in paras. 5 and 6 are sufficient in my view to indicate that the plaintiff is relying on the element of negligence despite the fact that the word "negligence" had not been asserted. The defendants could not have been caught by surprise by the omission of the word - see *Datton v. Bognor Regis Urban District Council* [1972] 1 QB 373 at pp. 391-392.

I am therefore more than convinced that the application of the defendants to strike out the statement of claim of the plaintiff cannot be sustained. I confirm that the decision of the Senior Assistant Registrar is correct. The defendants are required to pay the costs of this proceedings to the plaintiff.

Also found at [1991] 2 CLJ 999